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June 14, 2018

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: *Everglades College, Inc. v. NLRB*, No. 16-10341-AA and
10644-FF

Dear Mr. Smith:

This letter reply brief of the Intervenor-Respondent-Cross Petitioner Lisa Fikki is submitted in response to the Court's order of May 23, 2018, asking the parties to address the effect of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, No. 16-285 (May 21, 2018), on this case.

The only remaining dispute among the three parties to this case concerns the Board's conclusion that the agreement the Employer ordered the Intervenor to sign was unlawful because it would reasonably have been read to preclude the filing of unfair labor practice (ulp) charges with the Board. *Epic* does not relate in any way to that dispute. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that agreement not to file charges with government enforcement agency is unenforceable).

The Employer uses its opening letter brief largely in an effort to reargue the questions of whether the Board properly concluded that the agreement would reasonably have been read to preclude the filing of ulp charges with the Board and whether the Employer fired the Intervenor for not signing the unlawful agreement within the time period demanded by the Employer. Of course, those issues

were fully briefed and argued and the Employer is not entitled to reargue them based on the decision in *Epic*.

Unrelated to the Supreme Court's decision in *Epic*, both the Employer and the NLRB urge this Court not to proceed to decide this case based on the rationale described above (which was unanimously adopted by the Board Members). The Employer and the NLRB base their argument on the Board's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). They argue that the Board altered its standard for reviewing employer rules in *Boeing*, overruling its earlier decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On this basis, the Employer seeks additional briefing and the Board seeks remand. Everglades letter brief at 6; NLRB letter brief at 3. Neither suggestion should be adopted by the Court for three reasons.

First, the Employer waived this argument before the Board and cannot now raise it before this Court. Under 29 U.S.C. § 160(e), "No objection that has not been urged before the Board. . . shall be considered by the court" on a petition for review of the Board's order. Before the Board, the Employer argued only that the agreement would not be reasonably read to preclude the filing of charges with the Board. The Employer did not argue that that was not the correct standard or that the Board should overrule *Lutheran Heritage* or in any way alter the standard. See Charged Party Respondent's Brief in Support of Exceptions at 11-12, <https://www.nlr.gov/case/12-CA-096026>. The same is true in the Employer's opening brief to this Court. Everglades Opening Brief at 48. The Employer has thus waived the argument it now seeks to brief.

Second, long before the decision in *Lutheran Heritage*, which was overruled in *Boeing*, "the Board ha[d] regularly held that an employer violates the Act when it insists that an employee waive his statutory right to file charges with the Board." *Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92 (1995). See, e.g., *Great Lakes Chemical Corp.*, 298 NLRB 615, 621-22 (1990). And the Board had also long applied the same standard to unions. See, e.g., *Construction and General Laborers, Local 304*, 265 NLRB 602, 607 (1982) ("the test of coercion is not whether Respondent's practice proves effective in causing employees actually to waive statutory rights, but whether or not Respondent's practice 'reasonably tends' to have such an effect."). The separate and distinct line of cases protecting the right to file charges is founded on the separate and express protection of that right in 29 U.S.C. §158(a)(4). *Boeing* in no way undermined this line of cases.

Finally, even if the Employer could now question the validity of the standard the Board applied in this case, further briefing or remand to apply the standard adopted in *Boeing* is unnecessary. It is beyond question that the agreement at issue is unlawful under the standard adopted in *Boeing* because the agreement “predictably has an adverse impact on Section 7 rights that outweighs any justification.” *Boeing*, 365 NLRB No. 154 at 4. Here, all the Board Members agreed that the agreement would reasonably be read to prevent filing of charges with the Board, thus it would “predictably” have an adverse impact on Section 7 rights. And there was *no* justification for the agreement as written given it could easily and without any adverse consequences for the Employer have been rewritten expressly to except the filing of Board charges. As the Board’s General Counsel explained in a recent Memorandum providing guidance on “Handbook Rules Post-*Boeing*,” “[w]here the employer’s legitimate goals can be served by a narrower rule, an overbroad rule should be unlawful.” Guidance on Handbook Rules Post-*Boeing*, Memorandum GC 18-04 at 19-20 (June 6, 2018), <https://www.nlr.gov/reports-guidance/general-counsel-memos>. Thus, asking the Court to remand the case for reconsideration in light of *Boeing* would merely cause an extended and wholly unnecessary delay in the ultimate resolution of this case.

Finally, it is worth noting that the decision on this issue was unanimous at the Board, joined by both Member Miscimarra, who was subsequently in the majority in *Boeing*, and Members Pearce and McFerran, who were in the dissent in *Boeing*.

This Court should proceed to affirm the Board’s decision on this grounds.

Respectfully submitted,

/s/Harold Craig Becker

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the foregoing Letter Reply Brief of the Intervenor-Respondent-Cross-Petitioner was filed with the Clerk of the Eleventh Circuit this 14th day of June 2018 using the CM/ECF system, which served copies of the Brief via electronic mail on all counsel of record.

Dated: June 14, 2018

/s/Harold Craig Becker
Harold Craig Becker
Counsel for Intervenor